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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. MARIAELENE ANTUNEZ, Defendant and Appellant.	G051700 (Super. Ct. No. 13NF3594) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Kimberly Menninger, Judge. Remanded with directions.

Kristen Owen, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, and Meagan J. Beale, Deputy Attorney General, for Plaintiff and Respondent.

* * *

INTRODUCTION

A jury convicted Mariaelene Antunez of one count of unlawful taking of a vehicle in violation of Vehicle Code section 10851, subdivision (a) (section 10851(a)), and one count of receiving stolen property in violation of Penal Code section 496, subdivision (a) (Penal Code section 496(a)). The trial court denied Antunez's motion to reduce the offenses to misdemeanors and placed Antunez on formal probation for five years on the condition, among others, that she serve 270 days in jail.

Antunez makes four contentions: (1) the trial court erred by concluding it lacked the discretion to reduce the offenses to misdemeanors; (2) the court imposed an unauthorized sentence by ordering her to pay probation costs as a condition of probation; (3) probation conditions prohibiting Antunez from associating or residing with persons "otherwise disapproved of by probation" were unconstitutionally overbroad and vague; and (4) she was entitled to more days of presentence credit that she was given.

We agree with Antunez as to the first and third contentions. The trial court erroneously believed, based on the amount of loss to the victim, that the court did not have discretion to reduce the offenses to misdemeanors. The challenged portions of the probation conditions are unconstitutionally vague and overbroad. The Attorney General concedes the second contention. In her reply brief, Antunez concedes the fourth contention. We therefore remand with directions as set forth in the disposition.

FACTS

On April 15, 2013, Christopher Jennings rented a yellow Chevrolet Camaro, license plate 6XRW524, from an Enterprise car rental in Irvine. He was to return the car by 5:00 p.m. on April 17. The car was not returned. The credit card number given by Jennings for the security deposit could not be verified. Enterprise notified the police and reported the car as stolen on April 23.

At about 7:30 p.m. on April 23, Anaheim Police Officer Mira Han saw a yellow Camaro with license plate number 6XRW524 on La Palma Avenue near the

corner of West Street, in Anaheim. Han verified the car had been stolen and stopped it as it was turning into the driveway of the emergency room at Anaheim Memorial Hospital. Antunez was a passenger in the car. Another woman was the driver. In the trunk of the car was a computer printer in its original box. Antunez later said she had purchased the printer about two weeks earlier, but she did not have a receipt for it.

Anaheim Police Officer Vincent Dinh, who had arrived to assist Han, handcuffed Antunez and placed her in the backseat of his patrol car. Dinh read Antunez her rights pursuant to *Miranda v. Arizona* (1966) 384 U.S. 436. Antunez acknowledged that she understood her rights and answered Dinh's questions. Antunez told Dinh she had received the car two days earlier from a man named "Chris" at a Motel 6 in Stanton. She had just met Chris that day. She said that Chris's girlfriend had told her that she could use the car to go to the hospital or run errands. Antunez did not know Chris's last name. Chris did not say anything about how long she could use the car and said his girlfriend had rented it.

Antunez told Dinh she had no car and no money, and was on disability. She said she had searched the car but had found no registration. She said she had intended to abandon the car at the hospital or back at the Motel 6 because "she thought it was a little weird and she didn't want anything to do with it." Antunez suspected the car had been stolen and felt "stupid" for driving it, but she needed to go to the hospital that day and had no other means of transportation.

DISCUSSION

I.

The Trial Court Had Discretion to Reduce the Felony Offenses to Misdemeanors.

The jury convicted Antunez of unlawful taking of a vehicle in violation of section 10851(a) and receiving stolen property in violation of Penal Code section 496(a).

Both of those offenses are "wobblers"—that is, they may be sentenced as felonies or misdemeanors, in the trial court's discretion. (Pen. Code, § 17, subd. (b); *People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 974.)

At sentencing, Antunez's trial counsel made an oral motion to reduce both offenses to misdemeanors. The trial court denied the motion. The court stated: "First of all, with regard to this case, it is a[Penal Code section] 1170 case that the court does find that the amount is sufficient with regard to whether or not the court would grant a misdemeanor. [¶] The court would deny that, because the quantity of loss is beyond that which is set forth under [section] 1170 to reduce to a misdemeanor." The amount of loss to the victim was found to be $1,927.59.

Section 10851(a) states: "Any person who drives or takes a vehicle not his or her own, without the consent of the owner thereof, and with intent either to permanently or temporarily deprive the owner thereof of his or her title to or possession of the vehicle, whether with or without intent to steal the vehicle, or any person who is a party or an accessory to or an accomplice in the driving or unauthorized taking or stealing, is guilty of a public offense and, upon conviction thereof, shall be punished by imprisonment in a county jail for not more than one year or pursuant to subdivision (h) of Section 1170 of the Penal Code or by a fine of not more than five thousand dollars ($5,000), or by both the fine and imprisonment."

Penal Code section 496(a) states: "Every person who buys or receives any property that has been stolen or that has been obtained in any manner constituting theft or extortion, knowing the property to be so stolen or obtained, or who conceals, sells, withholds, or aids in concealing, selling, or withholding any property from the owner, knowing the property to be so stolen or obtained, shall be punished by imprisonment in a county jail for not more than one year, or imprisonment pursuant to subdivision (h) of Section 1170. *However, if the value of the property does not exceed nine hundred fifty dollars ($950), the offense shall be a misdemeanor, punishable only by imprisonment in a*

county jail not exceeding one year, if such person has no prior convictions for an offense specified in clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 or for an offense requiring registration pursuant to subdivision (c) of Section 290." (Italics added.)

The trial court mistakenly believed it could not reduce the offenses to misdemeanors because the amount of loss exceeded $950. Penal Code section 496(a) requires the court to reduce the offense to a misdemeanor if the amount of loss is $950 or less, but does not require the court to sentence the offense as a felony if the amount of loss exceeds $950. Section 10851(a) does not refer to any amount of loss.

"Generally, when the record shows that the trial court proceeded with sentencing on the erroneous assumption it lacked discretion, remand is necessary so that the trial court may have the opportunity to exercise its sentencing discretion at a new sentencing hearing. [Citations.] Defendants are entitled to 'sentencing decisions made in the exercise of the "informed discretion" of the sentencing court,' and a court that is unaware of its discretionary authority cannot exercise its informed discretion. [Citation.] [¶] Remand for resentencing is not required, however, if the record demonstrates the trial court was aware of its sentencing discretion. [Citations.] Further, remand is unnecessary if the record is silent concerning whether the trial court misunderstood its sentencing discretion. Error may not be presumed from a silent record. [Citation.]" (*People v. Brown* (2007) 147 Cal.App.4th 1213, 1228-1229.)

The record in this case is not silent. The trial court stated it could not reduce the offenses to misdemeanors due to the amount of loss. The record thus reveals the trial court proceeded on the erroneous assumption it lacked discretion to reduce the offenses to misdemeanors.

In *People v. Bolian* (2014) 231 Cal.App.4th 1415, 1417, the trial court revoked the defendant's probation and executed a previously imposed sentence of five years in prison. At the contested probation violation hearing, defense counsel asked the

court to follow the recommendation of the defendant's probation officer to reinstate probation with modified terms. (*Id.* at pp. 1418-1419.) The trial court terminated probation and stated it would be "'illegal and improper'" to reinstate probation because the violations were not "'de minimis'" and the defendant's sentence had been executed but suspended rather than imposition of sentence suspended. (*Id.* at p. 1419.)

The Court of Appeal reversed and remanded for the purpose of having the trial court determine whether to reinstate probation. (*People v. Bolian, supra*, 231 Cal.App.4th at p. 1422.) The record disclosed that the trial court might have believed it lacked discretion to reinstate the defendant's probation on modified terms. (*Id.* at p. 1421.) The trial court had broad discretion to choose between reinstating or terminating probation. (*Ibid.*) The trial court's statement that it would be "'illegal and improper'" to reinstate probation demonstrated the court was unaware of its discretionary powers. (*Id.* at pp. 1421-1422.) "'Defendants are entitled to "sentencing decisions made in the exercise of the 'informed discretion' of the sentencing court," and a court that is unaware of its discretionary authority cannot exercise its informed discretion.'" (*Id.* at p. 1421.)

Here, the trial court's comments disclosed that the court believed it had no discretion to reduce the offenses to misdemeanors due to the amount of loss. The court was unaware of its sentencing discretion based on its understanding of section 10851(a) and Penal Code section 496(a)—neither of which required the offense to be sentenced as a felony.

The Attorney General argues remand is unnecessary because there is no reasonable likelihood the trial court would reduce the offenses to misdemeanors given the court's comments that probation was only "borderline" appropriate for Antunez. The decision whether to reduce the offenses to misdemeanors and the decision whether to grant probations are distinct. Moreover, the court found that Antunez was eligible for

probation and sentenced her to 270 days in jail. This indicates the trial court quite possibly would have reduced the offense to misdemeanors if it believed it could do so.

We therefore remand to give the trial court the opportunity to decide, in its discretion, whether to reduce the offenses to misdemeanors. We offer no opinion on how the court should exercise its discretion.

II.

Payment of Probation Costs Cannot be Made a Condition of Probation.

The minute order placing Antunez on probation stated that she is to "[p]ay cost of probation or mandatory supervision, according to ability to pay, as directed by your probation or mandatory supervision officer pursuant to Penal Code section 1203.1b." The next entry in the minute order is "[d]efendant accepts terms and conditions of probation." The trial court orally listed payment of probation costs as among the probation conditions.

Although a trial court may order a defendant to pay for reasonable costs of probation, such costs are collateral and their payment cannot be made a condition of probation. (*People v. Acosta* (2014) 226 Cal.App.4th 108, 126.) The Attorney General agrees with Antunez that the trial court erred by making payment of probation costs a condition of probation.

III.

The Challenged Probation Conditions Are Unconstitutionally Vague and Overbroad.

The probation conditions imposed by the trial court included the following restrictions on association and residence: (1) "Do not associate with persons known to you to be parolees, on post-release community supervision, convicted felons, users or

sellers of illegal drugs, *or otherwise disapproved of by probation or mandatory supervision*" and (2) "Do not reside with persons known to you to be parolees, on post-release community supervision, convicted felons, users or sellers of illegal drugs, *or otherwise disapproved of by probation or mandatory supervision.*" (Italics added.)

Antunez contends the italicized portions are unconstitutionally vague and overbroad because they place no limits on those persons with whom the probation officer may prohibit from associating or residing with. We agree.

First, we address the Attorney General's argument that Antunez forfeited her challenge to the probation conditions by failing to object in the trial court. A challenge to a probation condition as facially vague and overbroad may be raised for the first time on appeal if it presents a pure question of law. (*In re Sheena K.* (2007) 40 Cal.4th 875, 888.) Antunez challenges the probation conditions on their face as a question of law. She does not assert the trial court erroneously received evidence in imposing those conditions, the prosecutor committed misconduct, or additional evidence would be needed to challenge the conditions. (See *ibid*.) Thus, Antunez did not forfeit her claim that the probation conditions were unconstitutionally vague and overbroad.

A probation condition may restrict the probationer's right to associate if the condition is primarily designed to meet the goals of rehabilitation and protection of the public and is reasonably related to those goals. (*People v. O'Neil* (2008) 165 Cal.App.4th 1351, 1356.) Thus, a defendant who has been convicted of drug possession may validly be subject to a probation condition that the defendant not associate with persons known by the defendant to be drug users. (*Id*. at pp. 1356-1357.)

A probation condition is constitutionally overbroad, however, if it places no limits on the persons with whom the probation officer may prohibit the probationer from associating with. In *People v. O'Neil*, *supra*, 165 Cal.App.4th at page 1354, one of the probation conditions was "'[y]ou shall not associate socially, nor be present at any time, at any place, public of private, with any person, as designated by your probation officer.'"

The Court of Appeal held that condition was unconstitutionally overbroad because it "d[id] not identify the class of persons with whom defendant may not associate nor d[id] it provide any guideline as to those with whom the probation department may forbid association." (*Id.* at pp. 1357-1358.) The condition was "unlimited" and would have allowed the probation officer "to banish defendant by forbidding contact with his family and close friends, even though such a prohibition may have no relationship to the state's interest in reforming and rehabilitating defendant." (*Id.* at p. 1358.)

The challenged portions of the probation conditions in this case suffer the same flaw as the condition held to be invalid in *People v. O'Neil*. The probation conditions properly prohibit Antunez from associating or residing with persons known to her to be parolees, on postrelease community supervision, convicted felons, or users or sellers of illegal drugs. But the challenged portions of the conditions also prohibit Antunez from associating or residing with persons "otherwise disapproved of by probation or mandatory supervision." Those portions of the probation conditions are overbroad and "permit[] an unconstitutional infringement on defendant's right of association." (*People v. O'Neil*, *supra*, 165 Cal.App.4th at p. 1358.)

The Attorney General argues the challenged portions of the probation conditions merely provided the probation officer "[s]pecific details" about implementing the probation conditions. Quite the contrary, the challenged portions of the probation conditions provide no details but give the probation officer complete discretion to restrict Antunez's contact with anyone "otherwise disapproved of by probation or mandatory supervision." In *People v. O'Neil*, the Court of Appeal explained: "There are many understandable considerations of efficiency and practicality that make it reasonable to leave to the probation department the amplification and refinement of a stay-away order. The court may leave to the discretion of the probation officer the specification of the many details that invariably are necessary to implement the terms of probation. However, the court's order cannot be entirely open-ended. It is for the court to determine

the nature of the prohibition placed on a defendant as a condition of probation, and the class of people with whom the defendant is directed to have no association. Since the condition in this case contains no such standard by which the probation department is to be guided, the condition is too broad and must either be stricken or rewritten to provide the necessary specificity." (*People v. O'Neil, supra,* 165 Cal.App.4th at pp. 1358-1359.)

The probation conditions in this case, unlike the condition at issue in *People v. O'Neil,* identify certain categories of persons with whom Antunez may not associate or reside ("persons known to you to be parolees, on post-release community supervision, convicted felons, users or sellers of illegal drugs"). The probation conditions thus can be made constitutional without rewriting them by striking the challenged phrase "or otherwise disapproved of by probation or mandatory supervision."

IV.

Antunez Received the Correct Number of Days of Presentence Custody Credit.

The trial court awarded Antunez a total of two days of presentence custody credit. Antunez argued in her opening brief that she was entitled to a total of 89 days of presentence custody credit. In her reply brief, Antunez acknowledges that she received the correct number of days of credit.

DISPOSITION

The matter is remanded to the trial court with directions to the court to:

1. Exercise its discretion and decide whether to reduce the offenses to misdemeanors and, depending on the decision, resentence Antunez.

2. Make payment of costs of probation a separate order and not a condition of probation.

3. Strike from the probation conditions relating to persons with whom Antunez may associate and reside the following phrase: "or otherwise disapproved of by probation or mandatory supervision."

In all other respects, the judgment is affirmed.

FYBEL, J.

WE CONCUR:

O'LEARY, P. J.

MOORE, J.